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Nos. 02-0241 & 02-0516

Supreme Court, U.S.
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In the
Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, ET AL.,
Respondents.

and

JENNIFER GRATZ AND
PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI AND ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE CENTER FOR EQUAL OPPORTUNITY, THE INDEPENDENT WOMEN'S FORUM, AND THE AMERICAN CIVIL RIGHTS INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

This brief *amici curiae* in support of the petitioners is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for petitioners and respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

Amici are non-profit research, education, and public advocacy organizations. Amici devote significant time and material resources to the study of the prevalence of racial, ethnic, religious, and gender discrimination by the federal government, the several States, and private entities. For instance, the Center for Equal Opportunity has obtained admissions data from public universities across the country and has published a series of studies that document racial and ethnic discrimination at those institutions. Amici expend significant time and money to educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, religious, and gender discrimination by the federal government, the several States, and private entities. No counsel for a party authored this brief in whole or part, and no person or entity other than amici curiae made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Amici support petitioners' argument that the court of appeals in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), erred in rejecting Barbara Grutter's constitutional challenges to the University of Michigan Law School's use of racial and ethnic preferences in its admissions process. Amici also submit this brief with regard to Jennifer Gratz's lawsuit against the University of Michigan. The brief is intended: (1) to make the Court aware of the prevalence of racial and ethnic discrimination by State institutions of higher education, (2) to

show the necessity for the Court clearly to reject the diversity rationale used by some States to justify racial and ethnic discrimination in their higher-education admissions, and (3) to demonstrate that discrimination in the form of racial and ethnic preferences is unnecessary for ensuring educational opportunity.

STATEMENT

No. 02-0241.

Petitioner Barbara Grutter applied for admission to the University of Michigan Law School's 1997 entering class but was rejected. She filed suit against the university, alleging that she had been discriminated against because of her race and ethnicity, in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.

The United States District Court for the Eastern District of Michigan, Friedman, J., following a bench trial, found the following basic facts. In 1992, the faculty of the Law School adopted a new, written admissions policy. *Grutter v. Bollinger*, 137 F. Supp.2d 821, 825 (E.D. Mich. 2001). Under the 1992 policy, the Law School "clearly considers an applicant's race in making admissions decisions," and race is "an enormously important factor" in deciding whether an applicant is accepted or rejected. *Id.* at 839, 841. According to the Law School's expert witness, Dr. Stephen Raudenbusch, racial and ethnic preferences[1] affected

[1] The Law School's 1992 policy provides admissions preferences for "underrepresented minorities," defined by the Law School to be African-American, Hispanic, Native American, and mainland-reared (but not Puerto-Rican-reared) Puerto Rican individuals. *Grutter*, 137 F. Supp.2d. at 841-42. For purposes of this brief, the term "minority" shall be used to describe individuals classified under the 1992 policy as

admissions to the Law School as follows:

Year	Minorities Admitted Using Preferences (%)	Minorities Admissible Without Preferences(%)
1995	26%	4%
1996	31%	8%
1997	33%	8%
1998	34%	9%
1999	37%	8%
2000	35%	10%

Id. at 839-42.

The Law School attempts to have entering classes that contain a "critical mass" of minority students. *Id.* at 840. According to Professor Richard Lempert, the professor who chaired the committee that drafted the 1992 policy, a "critical mass" consists of at least 10 percent minority students in each entering class. *Id.* at 834, 840. To achieve the desired "critical mass," the Law School's admissions office prepares a daily report of applicants, offers, and acceptances, broken down by race and ethnicity, which is used daily by admissions officers to ensure that the desired percentage of minority students in each entering class is achieved. *Id.* at 832, 842. The admissions office's efforts worked; minority students constituted at least 11 percent of each entering class selected under the 1992 admissions policy. *Id.* at 834.

The disparity between the academic qualifications of minority students and other students has existed in each class selected under the 1992 admissions policy. *Id.* at 840. This disparity has fluctuated from year to year, yet the percentage of minority students in each class has remained constant. *Id.*

"under-represented minorities" even though the term "minority" includes members of minority races and ethnicities not given preference in admissions by Michigan Law School.

at 841. Because the Law School's "critical mass" is a definable minimum percentage, and because the 1992 admissions policy resulted in the consistent achievement of that percentage, the district court determined that the 1992 admissions policy was "practically indistinguishable from a quota system." *Grutter*, 137 F. Supp.2d at 851. The district court accordingly held the 1992 policy to be unconstitutional.

In a 5-4 decision, the *en banc* United States Court of Appeals for the Sixth Circuit reversed, holding that the Law School's interest in student-body diversity justified its racial and ethnic discrimination against Barbara Grutter and that the 1992 policy was not an impermissible quota system. *Grutter v. Bollinger*, 288 F.3d 732, 746 (6th Cir. 2002)(*en banc*).

No. 02-0516.

Jennifer Gratz applied to University of Michigan's College of Literature, Science and the Arts as a prospective undergraduate in 1995. *Gratz v. Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000). Over the next four years, the University changed its method of admitting undergraduates four times, each time altering the method for admitting minority students.

In 1995, the University processed applications using four separate grids (grouping students based on high-school grades and admissions-test scores): in-state non-minority students; out-of-state non-minority students; in-state minority students; and out-of-state minority students. *Id.* at 827.

In 1996, only two grids were used: (1) in-state and legacy students; and (2) out-of-state students. "Action codes" were placed at the bottom of each grid providing instructions on how to alter the grids for minority students. *Id.*

In 1997, the same grids were used as in 1996, but this time minority students' high-school grades were simply

increased by half a grade point. *Id.*

In 1998, the University eliminated the grids and replaced them with a 150-point admissions scale. Minority students were given twenty points for their race/ethnicity. Other bonuses were given for socioeconomic status (twenty points); scholarship athletes (twenty points); geographic origin (six points); legacies (four points); and "outstanding" applications essays (three points). *Id.* In addition, the files of minority students were "flagged" during the process to make sure that they were treated differently throughout the application process. *Id.*

Jennifer Gratz sued, *inter alia*, to enjoin the use of racial and ethnic preferences by the University, but that part of her suit was rejected by the district court on summary judgment. *Gratz v. Bollinger*, 122 F. Supp.2d at 811. While her appeal was pending in the court of appeals, this Court granted certiorari to review the decision of the district court.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the court of appeals in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), and it should reverse the decision of the district court in *Gratz v. Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000).

The existence of State discrimination in higher education admissions is a major national problem. Over fifty years ago, this Court unequivocally held that State racial discrimination in law-school admissions violates the Equal Protection Clause of the Fourteenth Amendment. *Sweatt v. Painter*, 339 U.S. 629 (1950). In the wake of this Court's divided, three-way decision in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), however, State discrimination in the form of race preferences has been institutionalized throughout the United States. The widespread nature of this discrimination has been documented in studies published by

the Center for Equal Opportunity– relying on data supplied by State universities themselves–and it is conceded by the leading defense of such "race-sensitive" policies, *The Shape of the River* by William G. Bowen and Derek Bok.

To be sure, this Court's decision in *Bakke* stands for the simple proposition that State institutions of higher education may not use racial quotas in admissions processes. As determined by the trial court in Barbara Grutter's case, the Law School's admissions process violates this basic legal requirement. For this reason alone, the court of appeals' decision in *Grutter v. Bollinger* should be reversed. But the fact that such a transparently discriminatory system was being used twenty-five years after *Bakke* shows that admissions officials cannot be left to "narrowly tailor" the use of racial preferences. Instead, the diversity rationale should be rejected.

These cases are about far more than one university's use of racial quotas in its admissions. The Law School's quota system is but one type of institutionalized racial and ethnic discrimination, in the form of race preferences, that has blossomed in the United States since this Court decided *Bakke*. This Court should clearly hold that a State's desire for greater student-body racial or ethnic diversity does not justify racial and ethnic discrimination, no matter how such discrimination is implemented. In light of the varied, persistent, and tortuous schemes devised by discriminatory States to avoid *Bakke*-impermissible quota systems, while seeking to justify State discrimination with self-professed "good" educational intentions, amici respectfully submit that this Court must not consider only the "narrow tailoring" prong of constitutional strict scrutiny in these cases. Instead, this Court should address whether a State's desire for greater student body diversity is an interest so compelling as to constitutionally permit State racial and ethnic discrimination,

and this Court should clearly and affirmatively hold that it is not.

This Court, in construing the Fourteenth Amendment, has refused to permit State racial or ethnic discrimination *except* as a defined remedial measure constrained by Congressional and federal judicial oversight. It would be the height of folly to overturn this Court's bedrock understanding of the Equal Protection Clause based on States' self-professed "good" educational intentions, particularly when those intentions are buttressed only by dubious social-science research. After all, such research is seldom dispositive; as this brief discusses, for instance, it was cited originally by States in favor of *segregated* schools. Rather, the Equal Protection Clause is too important, too fundamental to our system of government and our system of law, to be laid aside by State officials claiming the mantle of superior expertise or the cloak of good intentions. As Justice Thomas wrote in *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995) (concurring in part and concurring in the judgment), "[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple." Nor can a diversity exception to Title VI be squared with the language of that statute.

Amici respectfully submit that the existing, fundamental principles of the Equal Protection Clause are sufficient for Ms. Grutter and Ms. Gratz to prevail. But it should be emphasized that ending race preferences in State higher education admissions will not close the doors of higher education to African Americans or Hispanics. It has not closed the doors of higher education in those first States – California, Texas, Florida, and Washington (constituting approximately twenty-five percent of the population of the

nation) – to have eliminated admissions race preferences at the instance of voter initiatives, State legislation, or judicial decree. To the contrary, African-American and Hispanic higher-education participation has grown, both quantitatively and qualitatively, in those States. There is no reason to think that African-American and Hispanic students will not similarly thrive in those States that, to date, have massively resisted any change to their institutionalized race preferences, should Ms. Grutter and Ms. Gratz prevail in these cases.

ARGUMENT

I. RACIAL AND ETHNIC DISCRIMINATION IN STATE HIGHER-EDUCATION ADMISSIONS IS A MAJOR NATIONAL PROBLEM.

There is no doubt that, as a result of the lack of clear guidance in this Court's *Bakke* decision, discrimination in the form of racial and ethnic preferences is widespread in American college and university admissions. The ubiquity of such discrimination means it is unlikely to diminish significantly if the Court fails to reject the diversity rationale as "compelling," ruling instead only that the University of Michigan's plans are not "narrowly tailored."

The Shape of the River, a 1998 book by William G. Bowen (former president of Princeton University) and Derek Bok (former president of Harvard University), is frequently cited by those defending "race-sensitive" admission policies, but even it acknowledges studies estimating "a marked degree of racial preference" in 20 percent of all four-year institutions, and a lesser degree of preference in another 20 percent of them. *Id.* at 15 & n.1. Because Bowen and Bok also assert that "only about 20 to 30 percent" of colleges and universities are at all selective, they effectively concede that, prior to the termination of race preferences in California, Texas, Washington, and Florida, the only schools that did not

discriminate on the basis of race and ethnicity were the ones that admitted everyone.

Bowen and Bok also concede that the degree of preference in university admissions is often significant. Race is far from being a mere tiebreaker; "black applicants have had an appreciably greater chance than whites of being admitted," indeed, a "considerably greater" chance. "In the upper-middle ranges of SAT scores, in particular, the admission probability for black applicants was often three times higher than the corresponding probability for white applicants." *Id.* at 26. It is not surprising then that, as Bowen and Bok further concede, the difference in college grades is "very large." *Id.* at 72. "The average rank of black matriculants was at the 23d percentile of the class, the average Hispanic student ranked in the 36th percentile, and the average white student ranked in the 53d percentile." *Id.*

A series of studies conducted by the Center for Equal Opportunity indicates that Bowen and Bok actually understate the pervasiveness and severity of racial and ethnic discrimination in university admissions. To date, CEO has studied undergraduate admissions policies at 57 different schools in eight States across the nation (California, Colorado, Maryland, Michigan, Minnesota, North Carolina, Virginia, and Washington), as well as the service academies at West Point and Annapolis; six medical schools across the country (in Georgia, Maryland, Michigan, Oklahoma, New York, and Washington); and three Virginia law schools.[2] The data subjected to the studies' regression analyses were supplied by the schools themselves, pursuant to state freedom-of-information laws. Every state system studied shows significant amounts of discrimination, and only a

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[2] The studies are available on CEO's website, www.ceousa.org.

relatively few individual schools show no evidence of discrimination.[3]

CEO studies found that black-white gaps in SAT verbal and math scores of 100 points or more are common, as are large odds ratios favoring blacks and, to a lesser extent, Hispanics over whites. The studies have also found corresponding disparities in graduation rates among different groups. Racial and ethnic "diversity" is promoted in some fashion on the websites of every state flagship institution. The diversity rationale is ubiquitous at colleges and universities, and is now spreading into employment, and into primary and secondary education, where it is similarly used to justify preferential treatment on the basis of race and ethnicity.[4]

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[3] All the undergraduate schools except for Maryland's are discussed in Robert Lerner & Althea K. Nagai, *Pervasive Preferences* (2001). All the medical schools, again excepting Maryland, are discussed in *Preferences in Medical Education* (2001). Maryland undergraduate admissions are discussed in Preferences in Maryland Higher Education (2000); Maryland's state medical school is discussed in *Racial and Ethnic Preferences and Consequences at the University of Maryland School of Medicine* (2001). The three Virginia public law schools are discussed in *Racial and Ethnic Preferences at the Three Virginia Public Law Schools* (2002). In addition, the state undergraduate institutions in California, Colorado, Michigan, Minnesota, North Carolina, Virginia, and Washington, and the service academies, were each the subject of one or more separate studies by CEO. All the studies were authored by Robert Lerner and Althea K. Nagai. Material from these studies appears in Robert Lerner & Althea K. Nagai, "Reverse Discrimination by the Numbers," *Academic Questions*, Summer 2000 at 71; Robert Lerner & Althea K. Nagai, "Preferences in Higher Education Admissions Policies: An Empirical Overview," Giftedness and Cultural Diversity (Diane Boothe & Julian Stanley eds.)(forthcoming).

[4] *See, e.g., Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999); *Eisenberg*

II. THE UNIVERSITY OF MICHIGAN'S 1992 LAW SCHOOL ADMISSIONS POLICY IS AN UNLAWFUL QUOTA SYSTEM AND SHOWS THAT *BAKKE* IS INEFFECTIVE.

The decision of this Court in *Bakke* is directly applicable to Barbara Grutter's case against the Michigan Law School's 1992 admissions policy. In *Bakke*, this Court ruled that the use of racial or ethnic preferences by a State to assure a desired percentage of students of a particular racial or ethnic group in a federally-funded educational institution is unlawful. *Bakke*, 438 U.S. at 307 (Powell, J.), 412 (Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ.). In this case, as found by the district court, the Law School uses racial preferences in its admissions process to achieve a minimum ten-percent minority representation within its student body that is "practically indistinguishable from a quota system." *Grutter v. Bollinger*, 137 F. Supp.2d 821, 851 (E.D. Mich. 2001). For this reason, direct application of this Court's decision in *Bakke* should result in affirmance of the decision of the district court in Ms. Grutter's case. But the fact that such a transparently discriminatory system was being used twenty-five years after *Bakke* shows that State admissions officials cannot be left to "narrowly tailor" the use of race preferences. Instead, the diversity rationale must be rejected in its entirety.

As found by the district court following full trial of Ms. Grutter's claims, the Law School desires that each entering class consist of a "critical mass" of minority students. *Grutter*, 137 F. Supp.2d at 840. To achieve a

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v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Taxman v. Piscataway Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *dismissed per stipulation*, 522 U.S. 1010 (1997).

"critical mass" of minority students, each entering class must have at least ten percent minority students. *Id.* at 834, 840. The Law School's admissions office prepares a daily report of applicants, offers, and acceptances, broken down by race and ethnicity, which is used by that office to ensure that the desired quantum of minority students in each entering class is achieved. *Id.* at 832, 842.

Since 1992, a disparity in the basic academic qualifications, consisting of college grades and LSAT scores, of minority applicants and other applicants has existed, and, importantly, the disparity has fluctuated from year to year. *Id.* at 839. This disparity results from the admissions office's use of its daily, race-identifying admissions reports to assure that each law-school class contains at least ten percent minority students. *Id.* at 842. By achieving a fixed "goal" of minority students in each class, comparable to the ten-percent quota used by the University of California in *Bakke*, the 1992 policy results in a direct quota system, with a disparity in academic qualifications between preferred students and regular students that is quite comparable to the University of California's unlawful quota system rejected by this Court in *Bakke*. *Cf. Bakke*, 438 U.S. at 277, n. 7 (showing disparity in academic qualifications between "regular" and "special" admittees).

Because the Law School's admissions process results in a de facto quota system, simple application of this Court's decision in *Bakke* mandates that the district court's judgment against the University be affirmed. In *Bakke*, this Court held that the University of California's medical-school admissions process, setting aside ten percent of each entering class for particular minority students, was unlawful. The Law School's quota system, entirely comparable in purpose and effect to the quota system of the University of California in *Bakke*, is concomitantly unlawful.

Despite the prohibition against quotas established by this Court in *Bakke*, in Barbara Grutter's case the court of appeals held,

> The record demonstrates that the Law School does not employ a quota for under-represented minority students. The Law School's witnesses, including the current and former admissions directors, all testified that the Law School does not reserve or set aside seats. For example, Dean Lehman testified: "We do not have a portion of the class that is set aside for a critical mass of under-represented minority students." Moreover, the Law School operates a single admissions system; there is no separate track for minority applicants insulating them from comparison with nonminority applicants. Thus, the Law School's admissions policy avoids the critical defect of the Davis admissions program.

Grutter, 288 F.3d at 746.

The court of appeals' rejection of the district court's quota finding completely neglects the intended meaning and intentional vagueness of "critical mass" in the 1992 policy and the persistence and assiduousness with which the policy was enforced. The Law School's admissions office made a *daily* analysis of offers made, offers outstanding, and acceptances by preferred-minority students specifically to affect each day's admissions decisions. The simple fact that the Law School was not so crude as to have separate piles for minority and non-minority student applications, but instead flagged each individual preferred-minority file– favoring each with increasingly more weight when the daily acceptance numbers did not appear to be meeting the "critical mass"

threshold – is irrelevant for purposes of the Equal Protection Clause. *See Bakke*, 438 U.S. at 324, 328 (Brennan, J., concurring in part and dissenting in part).

Similarly, the court of appeals' favorable reliance on Dean Lehman's naked denial of using a quota system overlooks the purpose, operation, and effect of the "critical mass" admissions policy as described by other Law School witnesses. According to Professor Richard Lempert, the professor who chaired the committee that drafted the 1992 policy, "critical mass" has a specific and concrete meaning, which was intentionally not recorded in the admissions policy, of at least 10 percent minority students in each entering class. *Grutter*, 137 F. Supp.2d at 834, 840. An evaluation of the credibility of the Law School's witness testimony is not even necessary (although it was available to the trial judge) to see that Dean Lehman's denial of an actual quota system is entirely inconsistent with the Law School's vigorous, dogged, daily enforcement of its officially ambiguous, but tacitly concrete, admissions policy.

The district court's conclusion that the Law School's 1992 policy is an unlawful quota system should be affirmed. Furthermore, the fact that one of the top *law* schools in the nation was following an admissions policy obviously at odds with this Court's ruling in *Bakke* underscores the need to strengthen and clarify that ruling. After twenty-five years, it is obvious that university officials cannot be allowed to weigh race so long as, in their opinion, they do so in a "narrowly tailored" fashion. University officials cannot in good faith claim that they have been relying on *Bakke*, because, while they seized on that portion of Justice Powell's opinion endorsing the diversity rationale, they have systematically ignored the narrow-tailoring part, as confirmed by the CEO studies generally (part I, *supra*) and the Law School's system specifically. If the door to discrimination is left ajar,

universities will drive a truck through it. As discussed in the next section, the door must be firmly shut by rejecting the university's diversity rationale, which in any event is not "compelling," as a justification for discrimination.

III. THIS COURT SHOULD ADDRESS, AND REJECT, THE "DIVERSITY" JUSTIFICATION FOR RACIAL AND ETHNIC DISCRIMINATION.

A. The "Diversity" Rationale is Not Persuasive, Let Alone Compelling.

A decision by this Court that ruled only on the "narrow tailoring" prong of strict scrutiny, and failed to resolve whether the achievement of student body diversity is a compelling interest justifying State racial and ethnic discrimination, would be unlikely to change the behavior of colleges and universities currently engaged in such discrimination.[5] It would not change the current de facto legal regime. If schools are allowed to take race and ethnicity into account in deciding whom to admit, they likely will continue to do so, and simply hope that no one will sue them or, if they

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[5] The use of strict scrutiny has two distinct but overlapping justifications. Its use is sometimes justified as necessary to determine whether the purported nonracial justification for a policy really is nonracial; other times, the doctrine seems to be that even concededly racial classifications are permissible if the stakes are high enough. The diversity rationale cannot pass muster under either approach. There can be no doubt that what universities like respondent are really after is not a variety of "experiences, outlooks, and ideas," *Bakke* at 314, but "some specified percentage of a particular group merely because of its race or ethnic origin," *id.* at 307. *Cf. Metro*, 497 U.S. at 614 (O'Connor, J., dissenting). And, as discussed below, if the flimsy educational benefits put forward by respondents are a "compelling" justification, then anything is.

are sued, that they can obfuscate precisely how, and how heavily, race and ethnicity are weighed. For the discriminatory behavior of the schools to abate, they must be instructed unequivocally that diversity is not a compelling State interest.

The only justification that this Court has consistently found sufficiently compelling to justify racial and ethnic discrimination is discrete remediation of prior discrimination.[6] There are, perhaps, other governmental interests that might be hypothesized as compelling enough to justify temporary racial and ethnic classifications by the government– such as national security (*see Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100-02 (1943)), or preventing bloodshed in the aftermath of a prison race riot (*see Lee v. Washington*, 390 U.S. 333, 334 (1968) (concurring opinion of Black, Harlan, and Stewart, JJ.)-and it is probably impossible to adduce them all or to state a formula by which they can be derived and limited. But, except in situations literally involving life and death, this Court has been rightly reluctant to accept nonremedial justifications as compelling (*see, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-77 (1986) (plurality opinion)), and it should be especially reluctant to accept a justification that is both amorphously grounded and threatens a permanent institutionalization of

[6] *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (race classifications must be "strictly reserved for remedial settings"); *id.* at 524-25 (Scalia, J., concurring). *See also Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); *id.* at 632 (Kennedy, J., dissenting) (criticizing "the use of racial classifications ... untied to any goal of addressing the effects of past race discrimination").

racial and ethnic discrimination. *See Wygant*, 476 U.S. at 276 ("ageless in [its] reach into the past, and timeless in [its] ability to affect the future"); *Metro Broadcasting*, 497 U.S. at 612, 614 (O'Connor, J., dissenting) (diversity rationale is "too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications" and "would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture"). As the petition points out (pp. 28-29), the diversity rationale, if accepted for higher education, could also justify pervasive discrimination in other areas of public life, including primary and secondary education, employment, service on different public boards, jury selection, housing, and so forth.

If education were impossible without racial classifications, then it might be fair to argue that States have a compelling reason to discriminate. But the University of Michigan's claim here is merely that education is improved, to some uncertain and unquantifiable degree, by interracial conversations and comments that occur randomly, sometimes in classrooms and sometimes outside them. Whatever the meaning of "compelling" may be, this falls short.

For an educational interest to be sufficiently compelling to justify race discrimination, it is also logical to require that the purported educational benefits significantly outweigh the various costs to the institution and to the wider society. The value of anything must consider its liabilities. And the liabilities attendant to the use of racial and ethnic preferences are substantial: They are personally unfair *and* set a disturbing legal, political, and moral precedent to allow State racial discrimination; they create resentment;[7] they

[7] *See* Paul M. Sniderman & Thomas Piazza, *The Scar of Race* 8-9,

stigmatize the so-called beneficiaries in the eyes of their classmates, teachers, and themselves;[8] they foster a victim mindset, remove the incentive for academic excellence, and encourage separatism;[9] they compromise the academic mission of the university and lower the academic quality of the student body; they create pressure to discriminate in grading and graduation; they breed hypocrisy within the school; they encourage a scofflaw attitude among college officials; they mismatch students and institutions, guaranteeing failure for many of the former;[10] they obscure the real social problem of why so many African Americans and Hispanics are academically uncompetitive; and they get state actors involved in unsavory[11] activities like deciding which racial and ethnic

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97-104, 109, 130, 133-34, 146-50, 176-77 (1993); and Paul M. Sniderman & Edward G. Carmines, *Reaching beyond Race* 15-58 (1997).

[8] The principle of nondiscrimination serves all Americans, and the use of preferences harms not only those immediately discriminated against but also the supposed beneficiaries. The use of a double standard communicates in this context that some racial and ethnic groups are incapable of competing at the same intellectual level as others. *See Croson*, 488 U.S. at 493 (plurality) ("[c]lassifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility."); *Metro*, 497 U.S. at 636 (Kennedy, J., dissenting). On self-stigmatization, see Shelby Steele, *The Content of Our Character* 111-25 (1990).

[9] *See* John H. McWhorter, *Losing the Race: Self-Sabotage in Black America* (2000)(e.g., pp. 235-38).

[10] *See* Stephan Thernstrom & Abigail Thernstrom, *America in Black and White* 405-11 (1997).

[11] *Cf. Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (quoting Justice Stephens' dissent in *Fullilove v. Klutznick*, 448 U.S. 534-535 n.5 (1980), which in turn cited laws from the Third Reich) ("[T]he very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals.").

minorities will be favored and which ones not, and how much blood is needed to establish authentic group membership.[12]

There are superficially a number of benefits that might be claimed for a diverse student body, but on analysis none can justify racial or ethic discrimination. For instance, greater diversity might teach toleration, acceptance, and openmindedness about other racial groups-but this lesson is undermined when there is a gap in the academic ability of the members of the different groups on campus, as there is when admission preferences are used. Greater diversity might lead

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[12] Powell's rationale in *Bakke* appeared to hinge on an assumption that a prohibition on racial discrimination by a university would somehow trench upon the school's First Amendment rights. *Bakke* at 313 ("petitioner invokes a countervailing constitutional interest, that of the First Amendment"). This was dubious at the time, and remains so. *Cf. University of Pennsylvania v. EEOC*, 493 U.S. 184, 198-99 (1990); *Bob Jones University v. United States*, 461 U.S. 574, 603-05 (1983). It could justify policies of segregation as well as affirmative action (*see Runyon v. McCrary*, 427 U.S. 160, 175-77 (1976)) and could be used by many employers– for instance, newspapers– who could wrap themselves in the First Amendment. Nor is it clear how a prohibition of racially discriminatory student admission policies would "abridg[e] the freedom of speech" for anyone. Acts of racial discrimination are simply not a form of expression entitled to constitutional protection, nor are such acts needed for teaching or learning. The "right" to engage in racial discrimination can be limited when the discriminator is not a state actor; a fortiori, it must yield when the discrimination is at odds with the Constitution. *Id.* at 176 ("'the Constitution . . . places no value on discrimination'") (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964)("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accomodations interferes with personal liberty."); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

to exposure to people with different ideas or backgrounds, but it is very dubious to use race as a proxy for anticipating individuals' thoughts and experiences. There are few ideas or experiences that only members of a particular racial group can have, and fewer still that all members of that group will share. In sum, racial diversity cannot be equated with actual viewpoint diversity[13] (and, indeed, universities show little interest in viewpoint diversity relative to melanin diversity).[14] Contradictorily, it might be argued that greater diversity is needed to teach the specific lesson that not all African Americans, for instance, think alike, but this is a rather obvious and narrow lesson, and it is hard to understand why it can be taught only by using racial and ethnic preferences.

The diversity rationale also posits that the educational effects of random interracial conversations and comments will

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[13] The errors in this approach were convincingly explained by Justice O'Connor in her *Metro* dissent, 497 U.S. at 602: "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." It makes more sense to select for the desired qualities rather than rely on increasingly dubious generalizations and stereotypes. *See id.* at 622 ("The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity."). In sum, "Government may not use race and ethnicity as 'a proxy for other, more germane bases of classification.'" *Hogan*, 458 U.S., at 726, (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)). *See also Metro Broadcasting*, 497 U.S. at 632 (Kennedy, J., dissenting) (criticizing "the stereotypical assumption that the race of [station] owners is linked to broadcast content"); *United States v. Virginia*, 518 U.S. 515, 533 (1996)("Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications.").

[14] *See e.g.*, "The Shame of America's One-Party Campuses," *Am. Enterprise*, September 2002 at 18-25.

be obtained only by unplanned face-to-face exposure at a university; they cannot be gained in any other way (for example, by studying Martin Luther King, Jr.'s "Letter from a Birmingham Jail" or Ralph Ellison's *Invisible Man*) or any other place (such as the interracial workplace for which the student is being prepared, or the popular culture – where the message of equality and tolerance is ubiquitous – or the student's neighborhood or house of worship, or the student's home). None of this is plausible, let alone compelling.

B. There Should Be No "Social Science" Exception to the Equal Protection Clause.

In these cases, the University proffered social-science evidence to buttress its claim that its interest in a diverse student body is compelling. Such evidence should not be sufficient to justify governmental action as divisive, disturbing, and damaging as racial discrimination. After all, claims of educational benefit arising from a particular teaching technique, or creating a particular school environment, are frequently made, but they are also frequently controversial and disputed.[15] That is certainly the

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[15] For instance, there is considerable controversy over whether bilingual education helps or hurts limited-English-proficient children. *See, e.g.*, Keith A. Baker & Adriana A. de Kanter, "Federal Policy and the Effectiveness of Bilingual Education," in *Bilingual Education* (Keith A. Baker & Adriana A. de Kanter eds. 1983); *The Failure of Bilingual Education* (Jorge Amselle ed. 1996).

All kinds of factors are said to correlate with improved educational performance. *See, e.g.*, Eugenia Costa-Giomi, "The Effects of Three Years of Piano Instruction on Children's Cognitive Development," 47 *J. Res. Music Educ.* 198 (Fall 1999); U.S. Dep't of Education, *The Class-Size Reduction Program: Boosting Student Achievement in Schools across the Nation* (Sept. 2000); Sheila G. Terry & Kimberly Kerry, *Classroom Breakfast: Helping Maryland Students Make the Grade* (2000 report for Maryland State Department of

case here. The evidence presented by Professor Patricia Gurin on behalf of the University has been strongly criticized in at least two studies cited to the court of appeals. *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*, by Drs. Robert Lerner and Althea K. Nagai, concluded: "There are many design, measurement, sampling, and statistical flaws in this study. The statistical findings are inconsistent and trivially weak. No scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in school benefits students." *Id.* at 1. Likewise, *Race and Higher Education*, by Drs. Thomas E. Wood and Malcolm J. Sherman, painstakingly reviews the data available and concludes: "The central problem that Gurin faced in producing her Expert Report is that the national database on which she had to rely actually *disconfirms* the claim that she was asked by the University to defend." *Id.* at 79 (emphasis in original). Yet another study, "Does Diversity Improve University Education?," by Stanley Rothman, S.M. Lipset, and Neil Nevitte, will be published this March in the peer-reviewed *International Journal of Public Opinion Research*.

When racial segregation was challenged in the 1940s and 1950s, the improved-education argument was made by social-science experts on behalf of the proponents of segregation, as well as its opponents. In *Davis v. County School Board of Prince Edward County, Virginia*, a companion case to *Brown v. Board of Education*, 347 U.S.

Education, Baltimore, available from Library of Congress); Julia Ellis et al., "Mentor-Supported Literacy Development in Elementary Schools," 44 *Alberta J. Educ. Res.* 149 (1998); Laverne Warner, "Classroom Basics: How Environments Affect Young Children," 25 *Tex. Child Care* 2 (Fall 2001) (highlighting the importance of classroom design and organization).

483 (1954), the Supreme Court brief by the State of Virginia attacked the social-science evidence presented by the plaintiffs, arguing that their witnesses "bas[ed] their opinion on a lack of knowledge of Virginia." Brief for Appellees at 24. And besides, "they were by no means the only experts who testified before the Court below." *Id.* To the contrary, the State "presented 4 educators, a psychiatrist and 2 psychologists" (*id.*), all "eminent men" (*id.* at 27) whose work is supported by "other outstanding scholars" (*id.* at 28) and who testified that "segregated education at the high school level is best for the individual students of both races" (*id.* at 29).

One college president concluded that, without segregation, "the general welfare will be definitely harmed" and "the progress of Negro education ... would be set back at least half a century." (*Id.* at 25.) A child psychiatrist testified, "When the two groups are merged, the anxieties of one segment of the group are quite automatically increased and the pattern of the behavior of the group is that the level of group behavior drops." (*Id.* at 26.) And the *chairman of the department of psychology at Columbia University* also had no doubt that separate-but-equal education was superior (*id.* at 27):

> If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed school where, in Virginia, inevitably he will be a minority group. Now, not even an Act of Congress could change the fact that a Negro doesn't look like a white person; they are marked off, immediately, and I think, as I

> have said before, that at the adolescent level, children, being what they are, are stratifying themselves with respect to social and economic status, reflect the opinions of their parents, and the Negro would be much more likely to develop tensions, animosities, and hostilities in a mixed high school than in a separate school.

In *Brown*'s predecessor, *Sweatt v. Painter*, 339 U.S. 629 (1950), the State of Texas defended its segregated law schools, arguing that "there is ample evidence today to support the reasonableness of the furnishing of equal facilities to white and Negro students in separate schools." Brief for Respondents at 96. "After much study for the United States Government," continued the State,

> [Dr. Ambrose Calier] found that a very large group of Northern Negroes came South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more "secure" at a college of his own people.

Id. Texas also cited Dr. Charles William Eliot, "President of Harvard for forty years," who concluded after a tour of the South that "if in any Northern state the proportion of Negroes should become large, I should approve of separate schools for Negro children." *Id.* at 97.

It is by no means inconceivable that social scientists and educators can still be produced who will testify that a lack

of diversity will facilitate education. They would testify that there are fewer distractions and more mutual support – indeed, single sex education has its advocates for these reasons, as do historically black colleges.[16]

Furthermore, the diversity rationale could equally be used to justify discrimination *against* formerly disadvantaged groups as well as in their favor. Asians and frequently Hispanics are victims of the preferences given to African Americans. If a State has an interest in having a university's student body approximate the demographic mix of the State, then logically the number of students from any group ought to be capped. For example, women, in *Johnson v. Board of Regents of the University of Georgia*, *supra*, were discriminated against relative to men, apparently because women were thought to be "over-represented." And indeed the federal government has already argued that an improved-education argument based on diversity can be used to justify discrimination *against* African Americans. Terry Eastland, Ending Affirmative Action 112-15 (1996) (Discussing the brief of the United States in *Taxman*, *supra*, and statements by President Clinton).

If a social-science exception to the Fourteenth Amendment is allowed, federal trial judges all over the country will have the authority and obligation to determine whether racial discrimination can be permitted based on the

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[16] *See* Dale Baker & Kathy Jacobs, "Winners and Losers in Single-Sex Science and Mathematics Classrooms" (paper presented at National Association of Research in Science Teaching Annual Meeting 1999, available at Library of Congress). Sexual discrimination has frequently been justified by some evidence similar to that used to justify racial discrimination here. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)(unsuccessful arguments advanced by defendants); *United States v. Virginia*, 518 U.S. 515 (1996)(same).

plausibility of the data presented by social scientists in a wide array of contexts, from jury selection to political appointments to law enforcement. *Cf.* Pet. 28-29.

In the final analysis, however, the diversity rationale is simply too thin to justify as constitutional an action as abhorrent as governmental discrimination based on a person's skin color or country of ancestry.

C. The Court Should Not Create a "Diversity" Exception to Title VI.

It might be objected that the decision whether to use racial and ethnic preferences ought to be left to the political branches. The first answer to this objection is that this is precisely the sort of discrimination that must not be left to politics, academic or otherwise. We have seen institutionalized discrimination in favor of whites be replaced with institutionalized discrimination against whites (and Asians) in less than a generation, and racial spoils will always be attractive to many politicians and other state actors. The Constitution itself makes clear that racial classifications are certainly not a subject to be left to the States. The second answer is that the political system *has* spoken to this issue already. It guaranteed "the equal protection of the laws" in 1868 with the passage of the Fourteenth Amendment, and Congress forbade any recipient of federal money from engaging in racial or ethnic discrimination in 1964 with the passage of the Civil Rights Act. Congress also banned such discrimination in 1866, 1870, and 1991, with the various enactments of 42 U.S.C. § 1981. Congress can hardly make any of these laws, but especially the language in Title VI, clearer. *See Bakke*, 438 U.S. at 412 (Stevens, J., concurring in part and dissenting in part).[17]

[17] *See also* Lino A. Graglia, "The 'Remedy' Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act," 22 Suffolk U. L. Rev. 569 (1988); Curtis Crawford, "Does Title VI of the 1964 Civil Rights Act Permit Racial Preference in Admissions by a University Receiving Federal Funds," http://www.debatingracialpreference.org/BAKKEBrennan+rebuttal.htm.

Either the diversity rationale is interpreted to allow discrimination against racial and ethnic minorities– which is completely at odds with its historical origins– or it means that Title VI literally denies equal protection, absolutely shielding some racial and ethnic groups from discrimination but not others. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Neither choice is palatable, and so the diversity rationale must be rejected. An interpretation of Title VI that allows discrimination aimed at remedying specific discrimination is barely reconcilable with the statute's antidiscrimination text; any other exception is not. Moreover, it risks opening the door to other, antiminority exceptions.

IV. ENDING PREFERENTIAL TREATMENT DOES NOT DENY EDUCATIONAL OPPORTUNITY.

The studies by Lerner and Nagai document that the elimination of racial and ethnic preferences would not lead to "whites only" State higher education, as some have claimed (even if we are to categorize Asians as "white" and Latinos as "non-white."). *See Preferences in Maryland Higher Education* 17-18 (2000); *Preferences in Virginia Higher Education* 12-14 (1999); *Preferences in Minnesota Higher Education* 11-14 (1999); *Preferences in North Carolina Higher Education* 12-14 (1998); *Racial Preferences in*

Michigan Higher Education 13-16 (1998); *Racial Preferences in Colorado Higher Education* 12-18 (1997). *See also* Bowen and Bok, *The Shape of the River*, *supra* at 35 (positing that African-American enrollment at the most selective schools could decline from 7.1 percent to 3.6 percent with nondiscrimination). Moreover, the students who, because of nonpreferential policies, are not admitted to a more selective school will assuredly be admitted elsewhere, and students who attend less-selective colleges, incidentally, achieve the same income levels as students *of comparable ability who attend more-selective schools*.[18]

Indeed, racial and ethnic preferences have been ended in California, Texas, Florida, and Washington, and there higher-education systems have remained notably diverse in their racial and ethnic participation. In California, minority enrollment in the University of California system increased from 18.8 percent in 1997, the last year in which preferences were used, to 19.1 percent in 2002. Sean Cavanagh, *Education Week*, April 24, 2002, at 16. In Texas, minority enrollment in state colleges and universities increased thirty percent between 1996, the last year in which preferences were used, and 2000. Julie Blair, *Education Week*, February 9, 2000, at 14. In Florida, minority enrollment in state colleges and universities increased twelve percent only seven months after the Florida Legislature ended preferences. John Gehring,

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[18] Stacy Berg Dale & Alan B. Krueger, "Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables," 117 Q. J. Econ. 1491 (Nov. 2002). Importantly the study also found that children from *low-income* families earned more if they attended selective colleges. But of course preferences based on low-income status would raise no issues under the civil-rights laws, while the current system of racial and ethnic preferences benefits primarily those from non-low-income backgrounds. See Bowen & Bok, *supra*, at 270-71.

Education Week, September 6, 2000, at 34. In Washington, African-American enrollment at the University of Washington's flagship campus decreased a statistically insignificant 1.6 percent (a total drop in enrollment of two individual students) following the elimination of preferences by Washington's voters. Nancy Wick, *Washington University Daily*, October 10, 2000, at 4. At the same time, minority applications to Eastern Washington University increased 36 percent following the preference-banning I-200 ballot initiative, and minority applications to Western Washington University increased 14.5 percent. *Id.*

Furthermore, as one would expect, the academic performance gaps that existed at colleges and universities that formerly used racial and ethnic preferences have been drastically reduced or eliminated with the termination of race preferences. For instance, the disparity at the University of California at San Diego between African-American students and other students has disappeared, with African-American honor-roll participation increasing from minuscule levels to levels mirroring their enrollment. *See* Gail Heriot, "The Politics of Admissions in California," *Academic Questions*, Fall 2001, at 29, 33-34; Gail Heriot, "University of California Admissions under Proposition 209: Unheralded Gains Face an Uncertain Future," 6 *Nexus* 163 (2001).

Finally, the ending of preferential treatment has also forced the States to focus on improving educational opportunities for disadvantaged students at the K-12 level, rather than papering over real differences in academic performance and educational opportunities with university race preferences. *See*, *e.g.*, James Traub, "The Class of Prop. 209," *N.Y. Times Mag.*, May 2, 1999, at 45; Senate Bill 6559 submitted in the Washington Senate by Jeanne Kohl-Welles (proposing and funding numerous improvements in

Washington's secondary schools in the wake of I-200)(reported in *The Seattle Times* at 1, March 1, 2000).

As already shown by the States that have ended racial and ethnic preferences, a ruling on behalf of Ms. Grutter and Ms. Gratz will not close the doors to higher education for African Americans and Hispanics. As the experience in these States shows, the use of racial and ethnic preferences is both unnecessary and counterproductive, as well as impossible to square with the principles of the Equal Protection Clause and the language of Title VI.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), and the decision of the district court in *Gratz v. Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000), should be reversed.

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